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OCTOBER TERM 1977

No. 77-1531

IN RE: 1975-2 GRAND JURY INVESTIGATION OF ASSOCIATED MILK PRODUCERS, INC.

BRIEF OF RESPONDENT THE NATIONAL FARMERS' ORGANIZATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, The National Farmers' Organization, Inc., ("NFO") respectfully submits that the Court should deny the Petition for Writ of Certiorari filed on April 25, 1978 by Associated Milk Producers, Inc., ("AMPI").

QUESTIONS PRESENTED

1. Whether an order which merely transfers grand jury materials to another district court for review and possible disclosure is appealable under 28 U.S.C. § 1291.

2. Whether rulings on motions questioning the propriety of grand jury proceedings are appealable at the time the district court has simply ordered transfer

of certain grand jury materials to another district court for its consideration as to whether they should be disclosed.

3. Whether, under the facts of the instant case, an order granting intervention to a third party interested in the proceedings related to the transfer of grand jury materials is immediately appealable.

STATEMENT OF THE CASE

The issues presented by AMPI's Petition arise from the issuance of a "housekeeping" order by a federal judge who had supervised a grand jury proceeding in the Western District of Texas. The order makes an inventory of grand jury materials available to another federal judge presiding over private antitrust litigation in the Western District of Missouri for his determination as to whether there should be any disclosure of grand jury materials in that litigation pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. In attacking the validity of the transfer order, AMPI also raises issues with respect to two earlier orders issued during the grand jury proceedings and an order permitting NFO to intervene in the proceedings related to the transfer of grand jury materials.

The grand jury proceeding was instituted in February 1975 in the Western District of Texas to investigate alleged obstruction of justice by AMPI, its officers, employees, agents and attorneys, during proceedings in several antitrust actions which have formed part of the Midwest Milk Monopolization Litigation, JPML Docket No. 83, pending before Chief Judge Oliver in the Western District of Missouri. Among the civil antitrust cases comprising JPML Docket No. 83 is *Alexander* v. *The National Farmers' Organization,*

Inc., Civil Action No. 19191-1 (W.D. Mo.) in which NFO as a counterclaim plaintiff has charged AMPI and others with violations of the federal antitrust laws and is defending an antitrust counterclaim asserted against it by AMPI. In January 1974 NFO filed a motion under Rule 37 of the Federal Rules of Civil Procedure charging that AMPI had destroyed, concealed and withheld evidence during discovery, and seeking sanctions against AMPI.[1] During the proceedings on NFO's sanctions motion AMPI admitted that documents were destroyed by burning, concealed in storage areas under individual names, and temporarily removed from AMPI's offices during discovery visits and document production in the NFO case. Furthermore, in testimony before the Senate Watergate Committee, a high-ranking official of AMPI testified that he had advised AMPI personnel to destroy documents in light of the NFO case, and they had done so.[2]

Although the grand jury investigating AMPI's actions was convened in San Antonio, Texas, where AMPI has its headquarters, there has always been an indisputable nexus between the multidistrict litigation before Chief Judge Oliver, and the grand jury proceeding in the Western District of Texas, supervised by Chief Judge Spears.

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[1] NFO's claims against AMPI and the other counterclaim defendants are now being tried before Chief Judge Oliver. NFO's motion for sanctions under Rule 37 has not yet been decided.

[2] Watergate and Related Activities, Milk Fund Investigation: Executive Session Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate, 93rd Cong., 1st Sess., pp. 6894-96, December 21, 1973, Testimony of David L. Parr.

The grand jury was discharged on August 6, 1976 without returning any indictments. Prior to discharge, however, it requested that custody of certain of the documents and transcripts of its proceedings be retained and that the business files and records of AMPI received by the grand jury be made available to other courts pursuant to an appropriate Rule 6(e) motion. (App. to the Petition pp. 25a-26a) On August 25, 1976, in response to this request and a statement from the Department of Justice that some documents and transcripts of testimony taken by the grand jury may be material to the JPML Docket No. 83 cases, and that the United States had no objection to entry of an appropriate order to make grand jury subpoenas, transcripts and documents available to the court in Missouri, (App. to the Petition pp. 28a-31a) Chief Judge Spears ordered disclosure of the grand jury materials to Chief Judge Oliver.

On August 31, 1976, AMPI asked Chief Judge Spears to reconsider his transfer order and for return of all documents produced by it to the grand jury. In a later memorandum AMPI requested further that documents produced to the grand jury by others be returned and that all of the grand jury subpoenas and testimony transcripts be suppressed and destroyed.

After a hearing on October 1, 1976, Chief Judge Spears modified his August 25, 1976 order by directing the clerk to transfer only an inventory of the grand jury materials to Chief Judge Oliver for *in camera* inspection, and to transfer the materials themselves only after Chief Judge Oliver certified that transfer of the materials was warranted. (App. to the Petition pp. 22a-23a) This order was stayed pending appeal.

On October 8, 1976 AMPI noticed an appeal of the October 1, 1976 transfer order. It subsequently amended its notice to include Chief Judge Spears' orders of February 19, 1975, May 6, 1975 and November 4, 1976. The orders of February 19 and May 6, 1975 had denied AMPI motions to quash or modify the subpoena issued to it by the grand jury, to stay the grand jury proceedings, and for an evidentiary hearing, all based upon AMPI's claims of defects in the grand jury proceedings. (App. to the Petition pp. 20a-21a) The order of November 4, 1976 granted NFO's motion to intervene as of right in the Texas proceedings pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. (App. to the Petition p. 24a) The basis for NFO's motion was that, under the August 25, 1976 transfer order, NFO had already moved before Chief Judge Oliver for disclosure of the grand jury materials pursuant to Rule 6(e), Fed. R. Crim. Pro., and would be aggrieved by the destruction of grand jury materials requested by AMPI.

In an opinion issued on February 6, 1978, the United States Court of Appeals for the Fifth Circuit dismissed AMPI's appeal, ruling that none of Chief Judge Spears' orders was final and appealable under 28 U.S.C. § 1291. As to the October 1, 1976 transfer order, the court of appeals stated that it was "no more than a decision to permit Chief Judge Oliver to decide whether the materials should be disclosed in JPML Docket No. 83. This is precisely the type of 'tentative, informal [and] incomplete' interlocutory decision that Congress in passing section 1291 intended to preclude from immediate review." (App. to the Petition p. 16a)